***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-7127

# United States Court of Appeals

FOR THE SECOND CIRCUIT

B P/S

JACKSON O. KING,

*Plaintiff-Appellee,*

—against—

DEUTSCHE DAMPFS-GES,

*Defendant and Third-Party Plaintiff-Appellee-Appellant,*

—against—

INTERNATIONAL TERMINAL OPERATING CO. INC. and COURT CARPENTRY & MARINE CONTRACTING COMPANY,

*Third-Party Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF OF THIRD-PARTY DEFENDANT-APPELLANT, COURT CARPENTRY & MARINE CONTRACTING COMPANY


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### Statement

This is an appeal by the third-party defendant-appellant, Court Carpentry & Marine Contracting Company, from a judgment in favor of the plaintiff, Jackson O. King, and against the defendant, Deutsche Dampfs-Ges, in the amount

of $42,900 and a judgment in favor of Deutsche Dampfs-Ges in the same amount for indemnity against the third-party defendant, Court Carpentry & Marine Contracting Company, jointly and severally with the third-party defendant, International Terminal Operating Co. Inc. This case was tried before Judge Constance Baker Motley and a jury on October 9, 10 and 11, 1974, and the jury answered special questions with respect to the issues set forth by the complaint and the third-party complaint. In answering these special questions the jury found that the defendant's vessel, the MS Trautenfels, was unseaworthy, that this unseaworthiness was the proximate cause of the plaintiff's accident and his injuries, and that the plaintiff was guilty of 25% contributory negligence. The jury awarded the plaintiff $57,200 which was reduced to $42,900 by virtue of the finding of 25% contributory negligence. As to the third-party complaint, the jury found that International Terminal Operating Co. Inc. had breached its warranty of workmanlike performance but that Court Carpentry & Marine Contracting Company had not breached its warranty of workmanlike performance.

This was the second trial of this case. The first trial resulted in a plaintiff's verdict against the shipowner on the issue of negligence after the third-party actions had been severed and the Court granted the shipowner's motion for judgment notwithstanding the verdict on the issue of negligence and directed a new trial on the issue of seaworthiness. Subsequent to the rendition of the verdict in this case shipowner's counsel moved for a directed verdict of indemnity against Court Carpentry on the basis of the jury finding of 25% contributory negligence which motion was granted by Judge Motley.

## The Facts

On June 16, 1968, plaintiff was a marine carpenter and lasher employed by Court Carpentry & Marine Contracting Company and had gone aboard the MS Trautenfels, a vessel owned by the defendant, Deutsche Dampfs-Ges, for the purpose of lashing cargo which had been stowed in the #3 hatch by the third-party defendant, International Terminal Operating Co. Inc. The plaintiff testified that he was hired by the third-party defendant, Court Carpentry & Marine Contracting Company, on the day of his accident when he received a telephone call and was told to report to work aboard the defendant's vessel (38a, 39a).* He said that he went aboard the defendant's vessel for the first time at 8:00 A.M. and at first worked in the #1 hatch securing cargo (41a). At approximately 10:30 he was told by his foreman, Andrew Auletti, to go into either the #3 or #4 hatch for the purpose of lashing some cargo on top of some structural "I" beams or "H" beams which had been stowed in this hatch by the third-party defendant, International Terminal Operating Co. Inc. (42a-47a).

It was his testimony that he entered this hatch by means of a ladder located at the forward end and proceeded into the shelter deck where these beams were stowed (45a). He then walked on top of these beams in what he described as an aisle (48a) about 3 feet wide. The surface of these beams looked alright to him and he walked the entire length of these beams carrying a roll of wire and 2 boxes of clips (49a). King testified that he did not see any spaces between any of the beams that were in the aisle or passageway through which he walked (49a) and that he had no trouble walking along that aisle or on top of these beams (50a).

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* References are to pages of the record on appeal.

After having walked the entire length of these beams at which time he arrived at the aft end of the hatch, he made a turn to his right toward the offshore side of the vessel and fell into a hole between the beams and the aft bulkhead of the hatch (51a, 53a, 91a).

It was King's testimony that he did not see the hole into which he stepped at any time before the accident happened (95a). He repeatedly testified that he had gone to the very end of the aisle in which he was walking before turning to his right (121a, 122a, 125a) and that the hole in which he stepped was at the end of the aisle and the beams. In addition to not seeing the hole before the accident King testified that he did not see the hole after the accident either (127a).

King further testified that when he went down into the hatch the steel beams were already there and that neither he nor any other employee of Court Carpentry had anything to do with putting them there. He further testified that he did not notice anything unusual in the way in which the beams were stowed (130a) and he had no difficulty in walking the complete length of the aisle right up to the end of the beams (131a).

Andrew Auletti, the carpenter foreman for Court Carpentry, testified that he had worked for them for approximately 10 to 12 years (140a) and that the marine carpenters had nothing to do with loading or unloading of cargo (161a). He further testified that he looked into the hatch before sending King and the other members of his gang in for the purpose of lashing cargo and he did not see any spaces between the steel beams. After the accident had happened, he noticed a space about 5 or 6 inches wide at the spot where King had fallen (157a, 158a, 177a, 178a, 182a). Auletti testified that he had been a carpentry fore-

man for 28 years (159a) and it was not unusual to come upon spaces in a stow of cargo (173a, 176a, 182a, 186a, 187a). It was Auletti's testimony that the lashers could not have pulled the "I" beams or "H" beams together so as to eliminate any possible spaces as these beams were too heavy (174a, 175a).

Plaintiff's counsel then attempted on redirect examination to elicit expert testimony from Auletti with respect to good stevedoring practice in loading "I" beams or "H" beams, the purpose being to establish that such beams could be loaded without leaving spaces between the beams. Objection was made on the ground that Auletti was not qualified and did not have any expertise with respect to stevedoring practices. However, the Court overruled the objection and permitted him to testify that the proper way of loading and stowing steel beams was to stow them tightly together (187a, 188a, 189a).

At the conclusion of the plaintiff's case defense counsel moved to dismiss the complaint on the grounds that there had been a failure to establish a prima facie case of unseaworthiness. This was the only issue in this case since this was the second trial and was tried on unseaworthiness only. This motion was denied by the Court. (288a-297a, 312a-334a).

## POINT I

**Plaintiff failed to sustain his burden of proof on the issue of unseaworthiness and the Court was in error in not dismissing the complaint.**

The only evidence adduced by the plaintiff with regard to his accident was his testimony indicating that there was a hole or a space between the end of the stowed "I" beams, upon which he was walking, and the aft bulkhead of the hatch or between the ends of the beams comprising the aisle upon which he was walking. Plaintiff did not produce any expert testimony to the effect that the stow of beams was improper or that the hole into which he stepped constituted a dangerous or defective condition. King repeatedly testified that the hole into which he stepped was at the very end of the aisle on which he was walking and was thus at the perimeter of the stow (51a, 53a, 91a, 121a, 122a, 125a). Not only did King testify that he did not observe anything unusual in the way the beams were stowed (104a) but Andrew Auletti, the carpentry foreman, testified that it was not unusual to come upon spaces in a stow of cargo (173a, 176a, 182a, 186a, 187a).

The law is well settled to the effect that the burden of proof is upon the plaintiff to show unseaworthiness. *Freitas* v. *Pacific Atlantic Steamship Company,* 218 F. 2d 562 (9th Circuit 1955); *Manhat* v. *United States,* 220 F. 2d 143 (2nd Circuit 1955). The warranty of seaworthiness does not require that the plaintiff be furnished an accident proof ship. Nor does it make the defendant an insurer of the plaintiff's safety. All that is required is that the vessel and its cargo and appurtenances be reasonably fit for its intended purpose. *Mitchell* v. *Trawler Racer Inc.,* 362 U.S. 539. Furthermore, the mere happening of an accident does not make a vessel unseaworthy. *In Re Marine Sulphur*

*Queen*, 460 F. 2d 89 (2nd Circuit 1972), *Mosley* v. *Cia Mar Adra S.A.*, 314 F. 2d 223 (2nd Circuit 1963), *Nuzzo* v. *Rederi, A/S Wallenco*, 304 F. 2d 506 (2nd Circuit 1961).

In *Nuzzo* v. *Rederi, A/S Wallenco, supra*, a case on all fours with the case at bar, plaintiff, a longshoreman, was injured when he stepped into a hole in a stow of lumber during the course of an unloading operation. His claim was that the space, which was about 18 inches across and approximately 2 feet in depth near the bulkhead, was a dangerous and unseaworthy condition within the meaning of *Mitchell* v. *Trawler Racer Inc., supra*. This Court in holding that the plaintiff's testimony was insufficient to sustain his burden of proof upon the issue of unseaworthiness (the negligence claim having been dismissed by the Court) said (Pages 507-509):

> "The only finding of fact bearing on that issue, to which the court gave expression, was that the claimant while 'reaching * * * about head high to take off the bundles from the wing in the hold, and his back being to the bulkhead or the wall, which was corrugated in shape, stepped backwards slightly, and in doing so stepped into a hole about 18 inches across and about two feet in depth. He fell backwards and struck his right shoulder against the corrugated wall of the bulkhead * * *.'
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> * * *
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> A careful reading of the transcript discloses no other evidence to support the plaintiff's case on the issue of unseaworthiness. And what appears is not enough, we think, to support the conclusion of unseaworthiness.
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> * * *
>
> Our holding rather is that there was neither finding nor proof of facts upon which the conclusion of unseaworthiness could properly be based. The mere fact

> that there was at a point in the perimeter a small empty space extending two feet below the adjacent 'floor' of boards was not enough by itself, as we read Mitchell v. Trawler Racer, supra, to violate the standard of reasonable fitness prescribed by that opinion. Just as the owner was under 'a duty only to furnish a vessel and appurtenances reasonably fit for their intended use,' as was said in Mitchell, so the owner's duty, with respect to the stowage of the ship, is only to furnish a stowage reasonably fit for its intended purpose. The purpose of stowage, of course, is a disposition of cargo within the vessel which will be reasonably safe and convenient both for carriage at sea and for unloading at the destination. The fact here that lumber of assorted sizes was to be fitted into a hold of fixed size made it likely, indeed inevitable, that here and there would be gaps or holes at the ends of the bundles."

The cargo of stowed "I" beams or "H" beams upon which King was walking at the time of his accident was reasonably fit for its intended purpose, was reasonably safe for carriage at sea and for unloading at its destination. This cargo was properly stowed and plaintiff did not produce any testimony which would indicate that these beams were stowed in a dangerous or defective manner or that the stow was contrary to good stevedoring practice or was contrary to the usual and accepted practice of stowing such beams.

In *Boutte* v. *M/V Malay Maru*, 370 F. 2d 906 (9th Circuit 1967), a case involving a longshoreman who was injured when his foot went into a space between bales of cotton, resulted in a defendant's verdict, the Court said at Page 908:

"The presence of slight spaces between the bales did not establish unseaworthiness, certainly not as a matter of law. See Nuzzo v. Rederi, A/S Wallenco, Stockholm, Sweden, 2 Cir., 1962, 304 F. 2d 506, 1962 AMC 1871, 1883. The Shipowner's victory is therefore sustained."

In *Passentino* v. *States Marine Lines, Inc.*, 299 F. Supp. 1252 (1969) the plaintiff, a cargo checker, was injured when he fell through a space between two porta-camps or skids of buildings near the #4 hatch. It was plaintiff's claim that the porta-camps should have been stowed flush against each other and the failure to do so created an unseaworthy condition. The space between the porta-camps was approximately 30 inches. The Court, in finding for the defendant, held that this conformed with the customary method of stowage, was within the applicable standards of the trade and thus the vessel was reasonably fit for its intended use. The Court in the *Passentino* case, while recognizing that improper stowage of cargo might create a dangerous condition, held that the standard was not perfection but reasonable fitness and the basic focus must be on the reasonably fitness test as enunciated in *Mitchell* v. *Trawler Racer, supra.*

In *Nuzzo* v. *Rederi, A/S Wallenco, supra,* this Court also indicated that direct evidence must be produced as to the usual and customary standards in the stevedoring industry with respect to a cargo stow and the absence of any such testimony to indicate that such standards were not met would constitute a failure of proof on the issue of unseaworthiness. In the *Nuzzo* case, *supra,* this Court said at Page 510:

"Here, there was no concealed defect, indeed no condition, unusual in a lumber stow, which, because of its propensity to cause injury, was *obviously* at vari-

> ance with general maritime practice. The problem here, as was said of the problem in Boudoin v. Lykes Bros. S.S. Co., supra, 348 U.S. p. 340, 75 S. Ct. p. 385, was 'one of degree'; it was whether the stow was 'within the usual and customary standards of the calling.' As to that the judge made no finding. He found only that the plaintiff 'stepped backward slightly, and in doing so stepped into a hole about 18 inches across and about two feet in depth. He fell backward and struck his right shoulder against the corrugated * * * bulkhead.' For lack of a finding that such a hole in a lumber stow was at odds with the 'usual and customary standards of the calling,' we must hold the conclusion of unseaworthiness erroneous, and reverse. And since we find insufficient evidence to support such a finding if it had been made we remand with a direction to dismiss." (Italics added.)

Since both King and Auletti testified that it was customary and usual to find spaces between beams, and in the absence of any testimony that such spaces would constitute a dangerous or defective condition or were contrary to good stevedoring practice and the usual and customary standards, plaintiff failed to sustain his burden of establishing that such standards were not met and failed to sustain his burden of proof on the issue of unseaworthiness.

Defense counsel's motion to dismiss the complaint and for a directed verdict should have been granted. The law is well-settled to the effect that a verdict should be directed by the Court where there is a complete absence of probative evidence to support a verdict for the non-movant or the evidence is so strongly and overwhelmingly in favor of the movant that reasonable and fair-minded men in the exercise of impartial judgment could not have arrived at

a verdict against them. *Armstrong* v. *Commerce Tankers Corp.*, 423 F. 2d 957. The evidence in this case was so overwhelmingly in favor of the defendant and there was such a total failure of proof on the part of the plaintiff that this case should not have been given to the jury for determination. There was no testimony in the record from which the jury could have found that the vessel was unseaworthy because of the space into which the plaintiff stepped. Nor was there any testimony of such weight that reasonable and fair-minded men in the exercise of impartial judgment could have reached different conclusions. Even with Auletti's incompetent testimony as to stevedoring practices in the record plaintiff failed to sustain his burden of proving that the vessel was unseaworthy since Auletti had no experience with stevedoring operations and lacked the necessary expertise required to impart any weight to his testimony.

In the case at bar the facts, and any inferences which might reasonably be drawn therefrom, point so strongly in favor of the defendant coupled with the lack of proof adduced by the plaintiff that the Court should have granted defense counsel's motion for a directed verdict and dismissed the complaint. *Boeing Company* v. *Shipman*, 411 F. 2d 365 (5th Circuit 1969). In dealing with motions for a directed verdict during the course of a trial, the determining factor is whether looking only to the evidence and reasonable inferences which tend to support the case of the non-moving party there is sufficient evidence to go to the jury. *Wilkerson* v. *McCarthy*, 336 U.S. 53, 69 S. Ct. 413, *Bigelow* v. *Agway Inc.*, 506 F. 2d 551 (2nd Circuit 1974), *Compton* v. *Luckenbach Overseas Corporation*, 425 F. 2d 1130 (2nd Circuit 1970), *Baker* v. *Texas and Pacific Railway Company*, 359 U.S. 227, 79 S. Ct. 664.

The directed verdict device was designed to be utilized in appropriate cases to spare the jury from lengthy deliberation when the evidence does not warrant it. *Diapulse Corporation of America* v. *Birtcher Corporation,* 362 F. 2d 736.

In *Brady* v. *Southern Railway Company,* 320 U.S. 476, 64 S. Ct. 232, the Supreme Court of the United States said (Page 234):

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

In the case at bar not only did the evidence adduced by the plaintiff not warrant the submission of this case to the jury for determination but there was a complete and total failure of proof on the issue of unseaworthiness. Since this was the only issue in the case the complaint should have been dismissed and it was error for the Trial Court to deny defense counsel's motion to dismiss the complaint and for a directed verdict in favor of the defendant.

## POINT II

**Andrew Auletti's testimony with regard to stevedoring custom and practice was inadmissible and the court was in error in permitting him to testify as an expert on stevedoring operations.**

As part of the plaintiff's case Andrew Auletti, the carpenter foreman for Court Carpentry, testified that he had been a Carpentry foreman for 28 years (159a) and that it was not unusual to come upon open spaces in a stow of cargo (173a, 176a, 182a, 186a, 187a). It did not appear from Auletti's testimony on either direct or cross-examination that he had any experience as a stevedore or that he had any expertise with respect to stevedoring operations as such. Nevertheless on redirect examination plaintiff's counsel was permitted to elicit testimony from him, over objection, that the proper way of loading and stowing steel beams was to stow them tightly together (187a, 188a, 189a). Auletti was not qualified as an expert on stevedoring operations, he had never worked as a stevedore, and the Trial Court permitted such testimony apparently because Auletti had testified that on occasions he had observed that some stevedores stowed "I" beams or "H" beams flush together and others left spaces between the beams. These observations of course did not qualify Auletti as an expert on stevedoring practice and procedures nor did it appear that Auletti had any training or background or experience in connection with the stowage of "I" beams or "H" beams.

At the end of the plaintiff's case when all defense counsel joined in a motion to dismiss the complaint on the grounds that the plaintiff had failed to establish a prima facie case of unseaworthiness, a long discussion took place between counsel and the Court and it appeared that the Court based

its denial of this motion upon a rereading of Auletti's testimony by the Court reporter (288a-305a, 312a-334a). The significant portions of Auletti's testimony upon which the Court apparently based its denial of the motion to dismiss was his testimony that the proper way of loading steel beams was to stow them tightly together plus his testimony that he had seen some stevedores stow the beams tightly and others leave them with spaces which he considered dangerous (187a-189a).

Obviously if Auletti's testimony had this effect upon the Court it undoubtedly had the same effect upon the jury and convinced them that a space in a stow of structural steel beams constituted a dangerous, defective and unseaworthy condition. As a general rule a Trial Judge has broad discretion in connection with the admission and exclusion of expert testimony. However, in the exercise of this discretion, the Court must determine whether the witness is qualified to express an opinion as an expert and if the witness is not qualified because of lack of experience or expertise in the particular subject matter, he should not be permitted to express an opinion which might influence the jury in their deliberations. *Butkowski* v. *General Motors Corporation,* 497 F. 2d 1158 (2nd Circuit 1974); *Stancill* v. *McKenzie Tank Line, Inc.,* 497 F. 2d 529 (5th Circuit 1974); *Gilbert* v. *Gulf Oil Corporation,* 175 F. 2d 705.

In the *Butkowski* case, *supra,* an action by a wife for the wrongful death of her husband arose out of an automobile accident allegedly caused by the absence of an external grease fitting on the car's idler arm resulting in a loss of the steering control. The complaint was dismissed for failure to make out a prima facie case and affirmed on appeal. The Court stated at Page 1159:

"Similarly, the judge did not commit error in dismissing the complaint. Plaintiff attempted to prove her theory of causation with the testimony of Myers, a passenger in the car at the time of the accident, and of Brehm, an auto mechanic proffered as an expert witness. But Judge Curtin refused to permit Brehm to testify before the jury, ruling that he was not a qualified expert because he was unfamiliar with the particular type of lubrication system employed on the model of car involved in the accident. This ruling was a permissible exercise of the trial judge's broad discretion to determine the qualifications of witnesses. The most significant aspect of Myer's testimony was the attribution to plaintiff's husband of the excited utterance 'I can't steer the car.' This was insufficient standing alone to justify submission of the causation issue to the jury. * * *"

In testing the competency of a witness to give expert testimony, it should appear that the witness has experience by reason of background and training with the matters with which his testimony will deal and that he has the ability by reason of such training and experience to offer an opinion or give expert testimony which will be helpful in determining the issues. *Spitzer* v. *Stichman,* 278 F. 2d 402 (2nd Circuit 1960).

In *Stevenson* v. *United States,* 378 F. 2d 354, 356 (2nd Circuit 1967), the Court said:

"Taxpayer's third and last claim of error involves the exclusion of testimony which he desired to introduce as 'expert' testimony with reference to the financial aspects customary in the liquidation of a phonograph record mail order club. The court below rejected the offered testimony because the witnesses,

> though having general knowledge of the record and book mail order business, had insufficient knowledge or experience with the liquidation of record clubs to qualify as experts in that area. We cannot say that the trial court abused its discretion by excluding this testimony.
>
> Affirmed."

See also *Smeragulio* v. *United States*, 205 F. Supp. 486, wherein it was held that an experienced sea captain who also had stevedoring experience was not qualified to testify as to procedures employed on a deactivated ship.

In cases involving claims of unseaworthiness evidence involving custom and practice has been permitted to show that a vessel was reasonably fit for its intended purpose. *Nuzzo* v. *Rederi, A/S Wallenco, supra.* While custom and practice is not conclusive on the issue of reasonable fitness, such testimony is sufficient for the Court to give the case to the jury for determination. *Avena* v. *Clauss & Company*, 504 F. 2d 469 (2nd Circuit 1974). However, such testimony with respect to custom and practice must be given by a witness who qualifies as an expert. In the case at bar the testimony given by Auletti apparently persuaded the Trial Judge to give the case to the jury for determination. Since Auletti had neither the background, training or experience as a stevedore to qualify him as an expert on stevedoring practices, his testimony with respect to the custom and practice of stowing steel beams and what constituted good stevedoring practice as well as testimony that the stow of beams in this case was improper should not have been admitted as he was obviously incompetent to testify in such matters.

Absent the testimony of Auletti there was a total failure of proof concerning custom and practice and what would

have constituted good stevedoring practice or a proper stow. The admission of such testimony was reversible error.

## POINT III

**In view of the jury verdict as to a question of fact the Trial Court was in error in directing a verdict in favor of the shipowner against Court Carpentry.**

Subsequent to the rendition of the verdict in this case in favor of Court Carpentry, shipowner's counsel moved for a directed verdict of indemnity against Court Carpentry on the basis of the jury finding the plaintiff 25% contributorily negligent, and counsel for Court Carpentry moved to dismiss the third-party complaint, for a directed verdict and for the entry of judgment in favor of Court Carpentry based upon the jury finding that at the shipowner had not sustained its burden of proving that Court Carpentry had breached its implied warranty of workmanlike performance.

Although the jury in answering special questions submitted to it by the Court found the plaintiff to be 25% contributorily negligent, it also found that the shipowner was not entitled to indemnity from Court Carpentry by virtue of the finding that the shipowner had not sustained its burden of proving that Court Carpentry had breached its implied warranty of workmanlike performance.

Notwithstanding this jury finding, *and notwithstanding that it had already been granted indemnity from International Terminal Operating Co. Inc.,* the shipowner moved for a second judgment of indemnity from Court Carpentry based upon the finding of plaintiff's contributory negligence. In granting such motion, Judge Motley overlooked the Seventh Amendment to the Constitution and Supreme Court decisions to the effect that the issues in a claim for maritime indemnity are for jury determination.

Whether a contractor has breached its warranty of workmanlike performance is an issue of fact to be determined by a jury, *Weyerhaeuser* v. *Nacirema Operating Company,* 355 U.S. 563, 78 S. Ct. 438.

In the *Weyerhaeuser* case, *supra,* the Supreme Court of the United States held that the issues in a claim for indemnity are for jury consideration under appropriate instruction. This proposition is so well settled that it is no longer open to argument and since the Supreme Court held that the indemnity issues were for jury consideration it follows that these issues were properly submitted to the jury for their consideration in this case. On each occasion since the decision in the Weyerhaeuser case that the Supreme Court has been confronted with the question as to whether the claim of maritime indemnity is to be determined as a matter of law or left for jury consideration it has unequivocally held that these issues are for the jury to decide, *Atlantic & Gulf Stevedores Inc.* v. *Ellerman,* 369 U.S. 355, 82 S. Ct. 780.

The Seventh Amendment to the Constitution of the United States provides

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."

The primary purpose of such amendment is the preservation of the common law distinction between the province of the Court and that of the jury where issues of law are resolved by the Court and issues of fact are resolved by the jury under instructions from the Court. *Baltimore &*

*C Line* v. *Redmond*, 295 U.S. 654, *Dimick* v. *Scheidt*, 293 U.S. 474.

In *Atlantic & Gulf Stevedores Inc.* v. *Ellerman Lines*, *supra*, special questions were submitted to the jury similar to the ones in the case at bar and although the jury found that the vessel was unseaworthy and the shipowner was negligent, the jury found that the independent contractor had not breached its warranty of workmanlike performance and the shipowner was not entitled to indemnity. The Court in the *Ellerman* case said that neither the Supreme Court nor the Court of Appeals could redetermine facts found by the jury any more than the District Court could predetermine them since that would result in a collision with the Seventh Amendment.

In *International Terminal Operating Co., Inc.* v. *N.V. Nederl*, 393 U.S. 74, 89 S. Ct. 53, the jury found that the contractor had fulfilled its duty of workmanlike service and accordingly that no indemnity was due. The Court of Appeals reversed this verdict and held as a matter of law that the shipowner was entitled to indemnity. The Supreme Court summarily reversed the Court of Appeals and reinstated the jury's verdict in favor of the contractor and against the shipowner and said with regard to claims for maritime indemnity "under the Seventh Amendment that issue should have been left to the jury's determination".

As the Court of Appeals for the Third Circuit said in *Humble Oil & Refining Company* v. *Philadelphia Ship Maintenance Company*, 444 F. 2d 727, 733:

> "If the jury concludes that the stevedore is free from all responsibility for a longshoreman's injury, no indemnity may be found as a matter of law. International Terminal Operating Co. v. N.V. Nederl. Amerik.

Stoomv. Maats., 393 U.S. 74, 75, 89 S. Ct. 53, 21 L. Ed. 2d 58 (1968)."

Contrary to the shipowner's contention cases involving a plaintiff's contributory negligence do not necessarily result in the granting of indemnity.

In *Julian* v. *Mitsui O.S.K. Lines Ltd.*, 479 F. 2d 432 (1973), the United States Court of Appeals for the Fifth Circuit affirmed a decision denying indemnity to a shipowner where the plaintiff was found to be *95%* contributorily negligent.

In *Delaneuville* v. *Simonsen*, 437 F. 2d 597 (5th Circuit 1971) the Court said (Pages 600, 601):

"* * * The question of whether a stevedore has breached its warranty of workmanlike performance is a question of fact to be determined by the trier of facts."

See also—*Byrd* v. *Blue Ridge*, 356 U.S. 525, 78 S. Ct. 893.

The function of the Court with respect to a jury verdict has been enunciated in *Lavender* v. *Kern*, 327 U.S. 645, wherein the Supreme Court of the United States held that it is only when there is complete absence of probative facts to support the conclusions reached by the jury that a jury verdict may be disturbed.

Despite the fact that the jury verdict in this case exonerated Court Carpentry and despite the fact that the jury found that the shipowner is not entitled to indemnity from Court Carpentry, although it is entitled to indemnity from International Terminal Operating Co., Inc., the shipowner has obtained a directed verdict of indemnity against Court Carpentry based upon the *Mortensen, McLaughlin*

and *Hartnett* cases. However, this very contention was only recently rejected by the New York Court of Appeals in *Anzalone* v. *Moore McCormack Lines, Inc.*, decided February 17, 1975, in which the Court affirmed without opinion a decision of the Appellate Division, First Department, in the *Anzalone* case, 43 A.2d 818, 351 N.Y.S. 2d 6. The *Anzalone* case presented the identical situation set forth in the case at bar in that the plaintiff was found to be 15% contributorily negligent but the jury in answer to special questions found that his employer had not breached its warranty of workmanlike performance. Although the shipowner's counsel moved for a directed verdict in the *Anzalone* case based upon the finding of 15% contributory negligence, the Court held that the jury determination takes precedence.

*Mortensen* v. *A/S Glittre*, 348 F. 2d 383, involved an oil slick which Mortensen was aware of and which he made no attempt to clean up, although he had been instructed to clean up whatever he discovered in the nature of a foreign substance, because he believed that the area was not one over which he would have to walk. This oil slick, which was created by a crew member, subsequently was the cause of his injury.

Although Mortensen was found to have been contributorily negligent, a verdict of indemnity was directed against his employer not because of his contributory negligence but because of his negligent conduct in failing to clean up the oil slick which he had noticed almost 2 hours before the accident despite the fact that he had been explicitly instructed what to do in such situations and had available to him the equipment necessary to remove the dangerous condition. Indemnification as a matter of law was granted because of the breach of warranty of workmanlike performance in failing to take steps to rectify a hazardous condition and eliminate a foreseeable risk of injury.

*McLaughlin* v. *Trellborgs Angfartygs A/B*, 408 F. 2d 1334 involved greasy engine bearings which McLaughlin was aware of and on which he eventually slipped causing his injury. While it is true that this Court in the *McLaughlin* case held that maritime law charges the employer with employee carelessness and likened the furnishing of an employee such as McLaughlin to the supplying of defective equipment as enunciated by the Supreme Court in *Italia Societa Azioni* v. *Oregon Stevedoring Company*, 376 U.S. 315, 84 S. Ct. 748 again it appeared that the employee had noticed the greasy bearings and failed to correct the condition which subsequently caused his injury. Significantly, the Supreme Court in the *Italia* case did not draw such an analogy but merely held that the stevedore's warranty of workmanlike performance included the furnishing of safe equipment.

*Hartnett* v. *Reiss Steamship Company*, 421 F. 2d 1011 involved a fall by the plaintiff from a bulkhead ladder while he was descending into the hold in order to unload grain. The jury rendered a verdict in favor of the plaintiff and only found him to be 1% contributorily negligent but a verdict of indemnity was directed against his employer. Although this Court commented that it seemed strange that conduct by an employee which deviated only minimally (1%) from the norm should subject his employer to full liability, it pointed out that the end result of the directed verdict in the indemnity action against the employer was justified because of the *employer's conduct* in breaching its warranty of workmanlike performance.

In the *Italia* case, *supra*, the Supreme Court indicated that liability for a longshoreman's injury should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. In dealing with

a suit for indemnification based upon maritime contract in an area where special rules govern the obligations and liabilities of shipowner, the Supreme Court said that these rules were designed to minimize the hazards encountered by seamen, to compensate for accidents that inevitably occur and to minimize the likelihood of such accidents, and felt that the burden should be placed ultimately on the company whose default caused the injury.

In *Hurdich* v. *Eastmount Shipping Corp.*, 503 F. 2d 397 (2nd Circuit 1974), this Court in discussing the philosophy underlying the indemnity concept as expressed by the Supreme Court in *Italia* indicated that this philosophy of permitting the ultimate loss to fall on the party which was best able to prevent that loss had been previously acknowledged in this circuit. *Bertino* v. *Polish Ocean Line,* 402 F. 2d 863 (2nd Circuit 1968).

In a very recent decision this Court in *Nye* v. *A/S D/S Svendborg,* 501 F. 2d 376 (2nd Circuit 1974), reversed the District Court's decision awarding a shipowner indemnity upon a finding of 50% contributory negligence on the part of the plaintiff. In the *Nye* case, *supra,* plaintiff's intestate was approximately 6 feet tall and weighed 550 pounds and had various health problems because of his obesity. His employer sent him to Las Palmas, Canary Islands, for the purpose of investigating the breakdown of a feed pump on defendant's vessel. While attempting to board the vessel at night from a launch by means of a pilot ladder he fell into the sea and drowned despite the efforts of the vessel's crew to rescue him. The District Court, after a trial without a jury, found a verdict in favor of Nye's widow and found Nye guilty of 50% contributory negligence. Based upon Nye's contributory negligence, the Court found that his employer had breached its warranty of workmanlike service by sending a man in Nye's physical condition to

work on defendant's vessel. This Court in reversing the indemnity judgment against his employer said (Page 380):

> "The only participation which Marine Engine had even remotely connected with Nye's death was in sending him to Las Palmas in the first place. To be sure, the trial judge found that Marine Engine had acted negligently in doing so. However, we believe that the district court's conclusion on this mixed question of fact and law, *see, e.g.*, Mamiye Bros. v. Barber Steamship Lines, Inc., 360 F.2d 774, 776-778 (2d Cir.), cert. denied, 385 U.S. 835, 87 S.Ct. 80, 17 L.Ed.2d 70 (1966), was erroneous and, accordingly, we set it aside. Marine Engine could not have known of the condition of the sea at the time of the attempted boarding, the facilities available to enable Nye to board, or those methods actually to be used. Nye had served the company well over the years on various assignments and, despite his unusual weight problem, apparently without incident which might have put the company on notice that he should not be sent out on any such mission. In short, of all participants Marine Engine would appear to be the least culpable.
>
> Indemnity, apart from express contract, can either be implied in law or implied in fact. If it is implied in fact it is said to be derived from the nature of the relationship of the parties. On the other hand, if the right is to be implied in law, it must be based 'on a "great difference" in the gravity of the fault of . . . two tortfeasors; or . . . upon a disproportion or difference in [the] character of the duties owed by the two to the injured plaintiff.' W. Prosser, Law of Torts 313 (4th ed. 1971)." (Italics added.)

Despite the fact that the Court found that Nye was guilty of 50% contributory negligence its decision, in re-

versing the indemnity finding against his employer, was based upon the fact that the employer had no knowledge of the facts and circumstances surrounding the accident and there had been no previous incidents involving Nye which might have put his employer on notice that he should not be sent on such a mission. Furthermore, this Court did not disturb the Trial Court's finding of 50% contributory negligence. *Nor did it hold that a finding of contributory negligence mandated a directed verdict against the employer.*

In the *Mortensen, McLaughlin* and *Hartnett* cases the condition which caused the plaintiff's accident was a condition which was either created by the plaintiff's employer or one which plaintiff's employer had notice of and could have remedied or corrected. The failure to do so constituted a breach by the employer of its warranty of workmanlike performance. In the case at bar, however, the condition which caused the plaintiff's accident, to wit, a space between steel beams, was created by the third-party defendant, International Terminal Operating Co., Inc., the stevedore which loaded the steel beams onto the vessel. This condition was *not* created by plaintiff's employer, Court Carpentry. Furthermore, Court Carpentry had no notice of this condition and no opportunity to remedy it or to cause it to be remedied. *Calderola* v. *Cunard S.S. Co.*, 279 F. 2d 475 (2 Cir. 1960). Andrew Auletti, Court Carpentry's foreman, testified that he made an inspection of the hold into which the beams were loaded and that he did not see the space into which the plaintiff eventually stepped (157a, 177a). The plaintiff also testified that he did not see the space into which he stepped either before or after the accident (88a). *Orlando* v. *Prudential SS Corp.*, 313 F. 2d 822 (2 Cir. 1963).

This is an entirely different situation from the factual pattern presented in the *Mortensen, McLaughlin* and *Hart-*

*nett* cases. In the case at bar Court Carpentry did not cause or create the condition which caused plaintiff's accident, was not responsible for this condition and did not do or fail to do anything which in any way contributed to the happening of the plaintiff's accident. As the Court said in the *Hartnett* case (page 1018):

> "Grain Handling was not an innocent bystander suddenly saddled with immense liability because of a peccadillo by its employee, plaintiff Hartnett. There was testimony indicating that Grain Handling was at the very least jointly responsible for the correct placing of the ladder in the hold, that another of its employees, gang boss McLaughlin, was supposed to inspect the hold for unsafe conditions and that he did not even go aboard the Reiss the morning of the accident."

In the case at bar Court Carpentry *was* an innocent bystander and should not be saddled with liability because of a jury finding of 25% contributory negligence on the part of the plaintiff. The shipowner by virtue of the jury's verdict obtained complete and full indemnity from the third-party defendant, International Terminal Operating Co., Inc. Since International Terminal Operating Co., Inc. was the party that created the condition which caused the plaintiff's accident, the jury properly found it responsible in indemnity to the shipowner. It was not the intention of the jury to have both third-party defendants indemnify the shipowner and the directed verdict in favor of the shipowner based upon the jury's finding of 25% contributory negligence is contrary to the jury's verdict in this case.

Contributory negligence of the plaintiff is at best a factor to be taken into consideration on the issue of whether the contractor has breached its warranty of workmanlike per-

formance and should not and does not constitute a breach of this warranty as a matter of law. *Nye* v. *A/S D/S Svendborg*, 501 F. 2d 376. In a case where the plaintiff's contributory negligence was such as to cause or create the condition which ultimately resulted in his injury or where the contributory negligence consisted of failing to remedy or cause to be remedied a dangerous condition of which he had notice as in the *Mortensen, McLaughlin* and *Hartnett* cases this contributory negligence would constitute a breach of his employer's warranty of workmanlike performance. However, in the case at bar plaintiff's contributory negligence did not cause or create the condition which ultimately resulted in his injury nor could he have been charged with failure to remedy or cause to be remedied the condition which caused his injury since he had no prior notice thereof. Obviously in this type of situation his employer did not breach its warranty of workmanlike performance and the jury so found. To impute plaintiff's contributory negligence to his employer under the facts in this case would be an inequitable unjust and harsh result and would not only distort the meaning of the cases but would unfairly saddle his employer with a portion of the indemnity from which the jury has already exonerated it.

Since the intention of the Supreme Court is to place the burden for accidents occurring to seamen or longshoremen on the company whose default caused the injury and since it is the Court's intention that liability should fall upon the party best situated to adopt preventive measures, the jury verdict in this case was obviously in furtherance of these objectives. It is undisputed that the third-party defendant-stevedore, International Terminal Operating Co. Inc., stowed the beams and left the spaces which the jury found caused the plaintiff's accident and injuries. The jury

finding that the stevedore had breached its warranty of workmanlike performance enabled shipowner to obtain full indemnity from the stevedore. The Court's direction of an indemnity verdict against Court Carpentry enabled the stevedore to obtain contribution of one-half of the plaintiff's judgment to which it clearly was not entitled. This constituted reversible error.

## CONCLUSION

The judgment in favor of the plaintiff should be reversed and the complaint should be dismissed. The judgment on the third-party complaint as against Court Carpentry should be reversed and the third-party complaint should be dismissed as against Court Carpentry.

Respectfully submitted,

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